Case No. 1403802/2021

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Konosokos	AND	The Oil and Pipelines Agency

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD In Chambers on 30 January and 3 February 2023
In Exeter on 31 January and 1 February 2023
Submissions presented remotely by video (CVP) on 2 February 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms P Skillin
Mr K Sleeth

Representation

For the Claimant: **In Person**
For the Respondent: **Mr O Holloway of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are all dismissed.

REASONS

1. In this case the claimant Mr Andrs Konosonoks claims that he has been unfairly dismissed, and that the principal reason for this was because he had made protected public interest disclosures. He also brings claims for detriment on the grounds of having made these protected public interest disclosures, and for direct race discrimination. The respondent contends that the reason for the dismissal was gross misconduct, and it denies the claims.
2. We have heard from the claimant. The claimant was supported by three other witnesses. Mr Michael Irvine and Warrant Officer Andrew Cooke were present to give evidence, but their statements were not challenged by the respondent insofar as they related to matters of liability only, and we therefore accepted their statements in evidence. We also accepted in evidence a statement from Mr Brian Donoghue on behalf of the claimant, who was not present at this hearing, but we can only attach limited weight to this evidence because he was not present to be questioned on this statement.

3. The respondent adduced evidence from eight witnesses, all of whom had prepared written witness statements, and all of whom were present at the hearing and available to give evidence. The claimant was reassured that he was able to question all of them on their evidence but only chose to do so in respect of four witnesses. We have heard from Mr David Cates, Mr Ian Lindsay, Mrs Sue Jemmett, and Mr Adrian Jackson, all of whom gave evidence in person and who were questioned on their evidence by the claimant. In addition, we accepted the evidence of Mr Ben Jacobs, Mr Michael Lauder, Mr Paul Grange and Mr Steven Pilkington who were present to give evidence, but who were not challenged on their evidence by the claimant.
4. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts:
6. The respondent is the Oil & Pipelines Agency (the OPA) which is a Statutory Public Corporation sponsored by the Secretary of State for Defence. It is responsible for the safe and efficient operation and management of six naval oil fuel depots and one petroleum storage depot on behalf of the Secretary of State for Defence. It has about 170 employees. The respondent's Chief Executive, from whom we have heard, is Mr Adrian Jackson. He is also the respondent's Accounting Officer with responsibility for ensuring the delivery of the respondent's policies, aims and objectives, whilst safeguarding public funds and the departmental assets. It goes without saying that the safety and security of these depots is of paramount importance, and we accept Mr Jackson's evidence that risk management is a key focus of the respondent's Board.
7. The respondent has an obligation to comply with the Joint Services Publication 440 (JSP 440). This is the MoD's security standard for meeting the Government's security framework. The respondent is audited by a Navy Command Principal Security Adviser (PSyA) on behalf of the MoD at Navy Command to ensure that it complies fully with JSP 440. Mr Lauder, whose statement of evidence we have accepted, is the respondent's Process Safety and Security Manager. It is Mr Lauder's responsibility to ensure that the respondent is compliant with JSP 440.
8. As might be expected with such an employer, the respondent has a number of policies and procedures. These include Security Procedure Processes and Instructions which have specific provisions including those relating to terrorist threats, bomb warnings and chemical, biological and radioactive suspicious packages. There are also specific provisions relating to the respondent's personnel, all of whom are vetted to a formal Security Clearance level. It is a condition of the respondent's employees that they attain and maintain their appropriate security clearance. There are provisions relating to Ongoing Personnel Security which require Aftercare Reporting in certain circumstances. These are set out in JSP 440 under a section dealing with Potential Personnel Security Problems. This policy includes the following provisions: "Although it is difficult to discover if an individual poses a threat to security, past experience shows that certain warning signs can be detected … Some of the more obvious are: (from (a) to (p)) – (e) any illness or mental condition which may cause significant defects in judgment or which make the subject, unintentionally, a security risk … (h) illegal or inappropriate use of official IT … (k) change in personality, for example, from gregarious to withdrawn, worsening attendance record, for example frequent self-certificated sick leave. Any such concerns are reported on an Aftercare Incident Report (AIR) and the MoD operates Warning Advice and Reporting Points (WARPs) and they manage security incidents and breaches on behalf of the Principal Security Adviser (PSyA).
9. The respondent's procedures also include its Information Systems Acceptable Use Policy, which as its name suggests sets the parameters for acceptable use of its Information Systems. This policy provides: "Employees who work at remote locations or from home should only use company authorised computer equipment for business work." In addition, it provides: "If you have not been granted permission to use the Network you should not access or use the Network (or attempt to do so)". The policy also provides: "Employees

must not copy Network or other files without authorisation". The policy also provides that the Network should not be used for "providing information which breaches the requirement of all our staff with regard to Confidentiality Policy".

10. The respondent has a detailed Disciplinary Procedure which gives a non-exhaustive list of examples of gross misconduct which if proven are likely to result in summary dismissal. These include: "Fraud dishonesty and theft, including unauthorised possession of Agency property"; "Breaches of confidentiality, security procedures, policies or committing any material or persistent breach of any of the terms or conditions of an employee's employment"; "Serious, deliberate or negligent failure to comply with the Agency's Health and Safety Policies"; "Any action (whether on or off duty) that results in negative publicity for the Agency or brings the Agency's reputation into disrepute, or by its nature makes the employee unsuitable to continue in their role"; and "Serious breach of the Agency's Information Systems Acceptable Use Policy".
11. One of the Oil Fuel Depots for which the respondent is responsible is the Thanckes depot in Torpoint in Cornwall. This is close to the Royal Dockyard in Devonport, Plymouth, and is referred to as either the Thanckes depot or the Plymouth depot. Mr David Cates, from whom we have heard, was Acting Operations Manager at that depot from 2017, and as of November 2022 he has been Acting Depot Manager. The Depot Manager at the time was Mr Neil Kerslake. We have also accepted the evidence of Mr Steven Pilkington who is employed by the respondent as an Environmental Health & Safety Adviser, also based at the Thanckes depot.
12. The use of mobile phones in fuel depots is potentially dangerous, not least because the respondent has duties under the Control of Major Accident Hazards (COMAH) Regulations 2015 to control all sources of ignition. For this reason, the respondent has a rule prohibiting the carrying and using of mobile phones in specified areas on its various sites. We have also accepted the evidence of Mr Paul Grange, the respondent's Operations Director, who was of the view in early 2018 that the relevant rules could be made clearer. On 20 March 2018 he sent an email to remind all staff of the respondent's rules relating to where and when mobile phones could be used on site.
13. The claimant is Mr Andrs Konosonoks. He is a Latvian National, and he speaks Latvian, English and Russian. The claimant is a member of the Territorial Army in which he is very highly regarded, particularly with regard to his language skills. He commenced employment with the respondent as a Temporary Operator at the Thanckes depot on 1 August 2018. Mr Cates was his manager and he carried out an interim probationary review in October 2018. He marked the claimant as "excellent" for all categories which included attitude, team player and safety focus. He noted that he was a "very well-liked member of the team". The claimant's employment was then made permanent in December 2018. The claimant was awarded a pay increase from February 2019. Mr Cates informed him that he was a very important member of the team and was popular with the team and management.
14. In around July 2019 the claimant volunteered to be the Site Safety Representative, which met with management approval. A vacancy for the role of Fuel Supervisor vacancy then arose. Mr Cates and Mr Leaver who was then the Depot Manager interviewed the claimant on 27 March 2019. They supported the claimant who then attended a second interview with Mr Grange the Operations Director, and the claimant was appointed at that new role with effect from 1 October 2019. Mr Pilkington was also pleased with the claimant's contribution and supported his promotion.
15. There was a potential safety incident on 22 May 2020 at the Thanckes depot when a number of members of the public reported a strong smell of diesel or gas in the area, and the site had to be checked as a matter of urgency. The claimant was on duty then and after the area had been checked he asserts that he had received approval from Mr Kerslake to leave the site because everything was under control. There was then a meeting on 26 May 2020, which was the claimant's day off, and the claimant was required to attend a meeting with Mr Kerslake and Mr Cates. The claimant was dissatisfied with this meeting and he raised a formal grievance on 16 June 2020 addressed to Mrs Sue Jemmett, the respondent's HR Director, from whom we have heard. The claimant complained that he had been threatened with disciplinary action by Mr Kerslake and Mr Cates on the basis

that he had allowed all operators to leave the site before 2 pm, and that he was not interested in site safety and that he wanted to leave. He felt that Mr Kerslake and Mr Cates were "twisting, falsifying and backing each other for me to admit that I have done something wrong on that day."

16. The claimant recorded his discussions with Mr Kerslake and Mr Cates on 26 May 2020 without informing or seeking their consent. Mr Cates admits that when he was subsequently informed of this that it put his relationship with the claimant under strain.
17. Mr Adrian Collins, a Programme Manager with the respondent, investigated the claimant's grievance, interviewed the relevant personnel, and reported his findings to Mr Grange who subsequently determined the claimant's grievance. One of the findings of Mr Collins was to the effect that the claimant's attitude to his work and to his colleagues appeared to have deteriorated following the national lockdown and difficulties arising from the Covid-19 pandemic from April 2020. Mr Pilkington had given a statement to Mr Collins that the claimant had acted in an aggressive and agitated manner and was not receptive when invited to raise any matters at work or at home which might have been affecting him. Mr Collins noted in his conclusion to his report that all parties agreed that the claimant had been very good to work with but from April 2020 onwards they all noticed a change in his temperament, and they could not understand the reasons.
18. Meanwhile on 9 June 2020 the respondent held a remote video meeting for all its Safety Representatives. The meeting was chaired by Mr Lauder, whose statement we have accepted, who is the respondent's Process Safety and Security Manager. Mr Lauder was responsible for (and wrote) the respondent's Security Procedure Processes and Instructions. During this meeting the claimant expressed a negative view of the respondent's handling of Covid, and he raised other health and safety matters unconnected to Covid. Mr Pilkington attended that meeting and as a qualified health and safety professional he did not think the claimant's negative view of the respondent's handling of the Covid crisis was accurate or fair. He also felt that it was inappropriate of the claimant to have been so critical without having first raised these issues with him, or the depot manager Mr Kerslake. Mr Pilkington felt that the claimant's outburst was out of character, and it appeared to have been motivated by something other than genuine health and safety concerns. He therefore emailed Mr Lauder to inform him of his concerns and because he felt that Mr Lauder might not have known that the relations between the claimant, Mr Cates and Mr Kerslake were strained at the time following the incident which had taken place on 22 May 2020.
19. On 11 June 2020 there was a further discussion between Mr Kerslake, Mr Pilkington and the claimant. The claimant was agitated and aggressive during this conversation and made derogatory comments about the respondent's Senior Leadership Team, including that they "didn't have a clue about fuel storage". Mr Pilkington was shocked and felt that these comments were outrageous. He asked the claimant whether he had any significant underlying issues at work or at home which he wished to discuss because his behaviour was so out of character. Mr Kerslake and Mr Pilkington were both so concerned at the claimant's behaviour that they reported it in accordance with the respondent's security procedures and Mr Pilkington sent a statement to Mrs Sue Jemmett, the respondent's HR Director.
20. The claimant decided to step down from the position of Fuel Supervisor and chose to revert to the more junior role of Operator, so that he would be more available in the High Readiness Reserves in the Territorial Army. Mr Grange confirmed this in a letter to the claimant on 23 July 2020.
21. The claimant then commenced a period of certified sickness absence for work related stress and was absent from work from 24 July 2020 until 29 September 2020. This subsequently prompted a referral to the respondent's Occupational Health Department, to which the claimant agreed, and this resulted in a report from Occupational Health dated 10 August 2020. The report noted the claimant had been diagnosed with "work-related stress" by his GP and that he had reported "anxiety and negative intrusive thoughts; sleep disturbance; difficulty concentrating; reduced motivation; and lack of interest and enjoyment of things he would typically find pleasurable". There was a recommendation that

the claimant would benefit from a short course of focussed talking or psychological therapy which the respondent offered the claimant, but which he subsequently declined to accept.

22. Meanwhile Mr Grange considered the report which Mr Collins had prepared in reply to the claimant's grievance, and he wrote to the claimant with the outcome to his grievance on 11 September 2020. The claimant had raised two allegations: the first was that the site management had operated with an unacceptable level of dishonesty; and secondly that the site was being run in an unsafe manner. Mr Grange rejected both allegations and confirmed that no evidence had been found to support the accusation that there was any dishonesty, and that there was no conspiracy to try to engineer the claimant out of the organisation. Mr Grange felt that the claimant's perception of various issues was fundamentally flawed and suggested that this might have been because of the heightened anxiety caused by the Covid 19 crisis. He also confirmed that health and safety remained of paramount importance on a COMAH regulated site, and he referred to the various regulations with which the respondent had fully complied.
23. Mr Grange also made four main recommendations. The first was that the Site Emergency Response Plan should be reviewed. The second was to ensure that there was a clear understanding of roles and responsibilities on site particularly between those of Fuel Supervisors and Operators. The third was that it seemed that the claimant's attitude to work had changed in the last few months and he offered the full support of the respondent and a referral to occupational health if the claimant thought this might be helpful. Mr Grange finally suggested that mediation might be arranged to try to repair the relationship between the claimant and management at the site. Mr Grange concluded his grievance outcome letter as follows: "We genuinely want to see you return to work, fit and well, and move forward with the management team as we do believe you have a lot of potential and can positively contribute to the future of the Depot provided we can rebuild the relationship between you and the local management team. They are certainly willing to move forwards with you and support you in the workplace and I hope you are willing to meet with them to work towards this objective."
24. The claimant did not accept this offer of mediation, and he then submitted an appeal against Mr Grange's rejection of his grievance by letter dated 29 September 2020. The appeal raised new health and safety complaints and new grievances. The claimant accepted in his evidence that matters were getting worse, not better. By way of a further letter of complaint to Mrs Jemmett on 4 October 2020, the claimant complained of further safety breaches and stated: "I believe that this incident has been made artificially worse to provoke an overreaction from me that is directly linked to the grievance appeal I submitted on 29/09/2020. On this basis I'm asking that Paul Grange Neil Kerslake Dave Cates and Steve Pilkington are suspended until the end of the investigation into my grievance appeal". Mr Grange and Mrs Jemmett then arranged to meet with the claimant on 14 October 2020 to discuss the process to be adopted in connection with the grievance appeal. The claimant was accompanied by his Unite trade union representative Mr Richards.
25. Shortly after the claimant's return from sick leave there was another meeting of Safety Representatives on 6 October 2020. Mr Kerslake the depot manager emailed Mrs Jemmett on 8 October 2020 expressing his concern about the claimant's conduct. He complained of the claimant's confrontational attitude and that he was "blanking him" in front of the rest of the team. He confirmed that the claimant was creating a negative working atmosphere which was not beneficial to the site. Another employee Mr Stockwell had reported to Mr Kerslake that the claimant had been sacked from his previous employment when they were both working together because the claimant had breached IT security and attempted to "blackmail the management team". Mr Kerslake felt that the claimant was trying to do that again.
26. Mr Lauder the Process Safety and Security Manager was also alarmed at the claimant's behaviour at this meeting which he considered to be aggressive and antagonistic and created a hostile environment for those in attendance. He felt the claimant was failing in his duty to promote co-operation and seemed to be using the forum to attack management. Shortly thereafter Mr Lauder attended a Security Audit meeting on 8 October 2020 and raised his concerns about the claimant's change in personality to the Navy Command

Principal Security Adviser (PSyA). They agreed that the respondent should raise an Aftercare Incident Report (AIR). Mr Lauder discussed this with Mrs Jemmett, because they were the only two officers within the respondent's organisation who had direct access to MODNet, the MoD computer system. Mrs Jemmett then raised this First AIR on 22 October 2020.

27. The claimant accepted in cross-examination that it was appropriate for Mr Lauder to have raised these issues to the Navy Command PSyA. We also accept Mrs Jemmett's evidence that she raised this first AIR because of the potential security risk which she and Mr Lauder had identified, and for no other reason.
28. This First AIR reported the following concerns about the claimant to the MoD: "Coinciding with Covid 19 the on-site Operations Management Team and the EHS Adviser have seen a distinct change in his personality. He has become confrontational and argumentative. He has raised health and safety concerns and continues to raise the same issues. These have been discussed with him. He does not accept the responses given. He raised a Grievance in June 2020 which has been investigated and he received an outcome letter. He has appealed this and raised new perceived issues. He has repeatedly demanded the suspension of the Operations Manager, Depot Manager, DHS Adviser and the Operations Director, although there are no grounds for the Oil and Pipelines Agency to suspend them. He repeated this demand in the presence of the Operations Director during an informal meeting with him via Teams, held by the HR Director and although he did not have a statutory right he was allowed to be accompanied and he chose to be accompanied by a Unite union official. During this meeting he again argued and would not accept anything said by the two Directors, even though the Union Representative also supported what they were saying was correct. He doesn't want mediation. He wants "justice". He has made covert recordings of discussions, which has provided as his evidence of bullying and harassment by management. However, when these recordings are listened to there is no evidence of such treatment, management are trying to reason with him and explain things. He does not accept anything they say and argued back constantly … He has tried to obtain personal data in relation to others and to obtain information for ex-employees who have been dismissed. The behaviour is subversive, or it could be that he is mentally unwell." The report also added that the respondent considered that the Security Concern Level was "significant concern" and that he would have access to guns and ammunition whilst attending at the Territorial Army and that he was being disruptive on site and undermining management. The report also recommended that the claimant's security clearance should be suspended pending further investigation.
29. The claimant accepted in cross-examination that it was reasonable for Mrs Jemmett to have submitted this First AIR, save that the claimant does not accept that it was reasonable for Mrs Jemmett to include the content which she did. The claimant suggests that these matters could not have been that serious simply because the respondent did not choose to commence the disciplinary process. Mrs Jemmett's view was that these matters fell short of the need for a formal disciplinary investigation, but nonetheless were sufficiently serious to cause concern.
30. As a result of this First AIR the MoD decided to suspend the claimant's security clearance as a temporary measure pending further investigation and a security review, and a decision by the UK Security Vetting Organisation. A letter to this effect dated 4 November 2020 was passed by Mr Lauder to the claimant on the following day. The claimant was sent home on full pay pending that further investigation. Mr Lauder told the claimant that his access to the respondent's computer system would be disabled, and that he was not authorised to use it.
31. Mrs Jemmett confirmed the position in a letter to the claimant dated 16 November 2020. She stated: "As you are aware all OPA personnel have to be security cleared to SC level and maintain their security clearance throughout their employment with the OPA. As a consequence of your security clearance being suspended, our instructions from MoD were that you may not have access to any documents or information that are classified Official Sensitive or higher classification … Following an initial investigation and review of access to our Network Systems we have determined that there is no way we can eliminate your

access to prohibited dated data. Your IT account has therefore been temporarily disabled, including access to your OPA mailbox."

32. The claimant accepted in cross-examination that he understood from this that he was not allowed access to the respondent's system and emails. He also accepted that despite this clear instruction given to him on 5 November 2020 he continued to gain unauthorised access to the respondent's IT system and emails with effect from 13 November 2020. The claimant also accepted that even if there were an innocent explanation for this (as he alleges), for instance that there was a "glitch" in the system, at no stage did he inform the respondent that he was able to gain access when he should not have been. He said he reported it to his trade union officer but asserted in evidence that he felt unable to tell the respondent that he was able to gain unauthorised access because of a complete breakdown in trust between him and the respondent's managers.
33. On 17 December 2020 the claimant then sent an email to Mrs Jemmett alleging that his line manager Mr Cates had been deliberately breaching site safety rules since November 2013. This letter is relied upon by the claimant as his first protected public interest disclosure. The claimant accused Mr Cates of having taken pictures on a mobile phone on site and uploading them to his Instagram account. Seven specific examples were given between 2013 and December 2017, and one for November 2020 which was after the respondent had renewed its regulations concerning the use of mobile phones in 2018.
34. Mrs Jemmett reported this complaint to Mr Grange, who investigated the matter with Mr Cates. He was satisfied that the more recent photographs had been to record installation works by a contractor using the camera supplied at the depot. Mr Cates had thought that the sky looked attractive and uploaded the pictures to his Instagram account. Mr Grange asked Mr Cates to refrain from uploading photographs of the site to his account but was satisfied that he had not breached any of the respondent's rules relating to the use of mobile phones on site and did not intend to take any further action. Mrs Jemmett reported this decision to the claimant who was dissatisfied with the response and complained again on 8 January 2021. The respondent had previously dismissed an employee for repeated failure to adhere to the rules regarding to mobile phones in February 2020. That former employer had brought an unfair dismissal claim to the Employment Tribunal which was heard in February 2021. The claimant was a witness for the ex-employee. The claim against the respondent was dismissed.
35. Meanwhile the claimant remained suspended and his access to the respondent's computer system remain disabled. Nonetheless, and unbeknown to the respondent, the claimant continued to gain unauthorised access to the respondent's IT and email system, and he took action deliberately to deceive the respondent that he was not still repeatedly gaining unauthorised access. The claimant continued to send emails from his work account to his personal account even though the work account should have been disabled. The claimant accepted in cross-examination that on one occasion he forwarded 80 emails from his work account to his personal email account. On 12 January 2021 the claimant emailed Mrs Jemmett from his private email account, and he requested her to send him a copy of both a Safety Moment memorandum, and the Chief Executive Mr Jackson's New Year message. It subsequently became clear that the claimant already had this information because of his unauthorised use of the account but was pretending that this was not the case, in order to maintain the pretence that he was not gaining access to his work account.
36. On 7 January 2021 an invitation was sent to the respondent's various Safety Representatives for a meeting which was due to take place on 19 January 2021. The claimant's work email address was on the distribution list as usual, but he should not have had sight of this because his access to the system was disabled. On 12 January 2021 the claimant emailed Mr Lauder to ask if there was any news concerning reconsideration of his security clearance. He also asked for a link to attend the Safety Representatives Meeting. Mr Lauder declined his request for a link to the meeting and said that as of yet there was no update on his security clearance from the UK Security Vetting Agency.
37. The invitation to the Safety Representatives Meeting was then re-issued on 12 January 2021. When the invitation came through Mr Lauder was concerned to see that the claimant's personal email address had been added to the invitation list, which had not been

the case on the previous invitation. Mr Lauder had not added the claimant's personal email address, so he referred the matter to Mr Ben Jacobs, the respondent's IT Infrastructure Manager, whose statement of evidence we have accepted.

38. Mr Jacobs' immediate concern was that he had failed properly to disable the claimant's access to the account in November 2020, but on checking he found that he had disabled it on 5 November 2020, and he had taken a screenshot at that time as evidence. On further investigation he found to his surprise that the claimant's account had been "reanimated", meaning that it had somehow been reactivated. Mr Jacobs immediately disabled it again, and he was then astonished to find that the account reanimated itself again. Mr Jacobs had been administering the respondent's system for 25 years and had never seen this happen before. He disabled the claimant's access to the system again, but his account reanimated a further two times. He was concerned he was missing something, so he asked his Assistant IT Manager Mr Stott to disable it in case he was making some sort of mistake. Mr Stott did this, but the account reanimated itself again.
39. Mr Jacobs was very concerned about this potential breach of the respondent's secure system. He reported the matter to their external IT service provider namely Content + Cloud on 14 January 2021. The system was only finally made secure on the following day by anonymising the account name. The IT service provider then produced a Malicious Incident Report. Their conclusion was that access had been gained to a suspect system administration account, and from this the claimant's account was reanimated by resetting the password. Mr Jacobs shared this Malicious Incident Report with Mr Dunsmuir, a lead cyber security consultant who is accredited to work with the MoD. He requested that Mr Dunsmuir reported this malicious incident to the respondent's Cyber Security Assessor within the MoD's Cyber Defence and Risk Directorate.
40. The claimant did not challenge Mr Jacobs' evidence to the effect that the claimant was responsible for a significant and deliberate breach of the respondent's IT system.
41. On 18 January 2021 the claimant reported to the respondent that his security clearance suspension had been lifted. This coincided with the respondent's significant concerns about the above IT breach. Mrs Jemmett spoke with the relevant caseworker who had reinstated the claimant's security clearance to mention her concerns about the IT breach. That caseworker advised Mrs Jemmett to raise an Aftercare Incident Report.
42. Mrs Jemmett acted on that advice, and she then submitted a second Aftercare Incident Report to the MoD on the same day 18 January 2021. This Second AIR stated as follows: "We became aware that the individual is having dealings with an ex-employee who has made a tribunal claim … and has passed him confidential information not through authorised channels. The ex-employee has made a threat, in writing via our solicitors that if we do not settle his claim (which is £100,000) that he will go to the papers and the HSE. That ex-employee is currently working as a contractor in the Royal Navy Dockyard. Andrs [the claimant] made a veiled threat to go to the HSE. We do believe he is complicit in the threat by the ex-employee. Anecdotally we were informed on Friday by a current employee, who knew Andrs from his previous employment, that Andrs managed to gain access to that previous employer's computer systems to areas that he was not authorised to access and that he attempted to blackmail that company. Our Security Controller is extremely concerned too … The activities that we are now aware of raise, at the basic level, his character insofar as being honest and trustworthy. We are also investigating activities whereby he has breached the Confidentiality & Privacy Policy, the OPA's Information Systems Acceptable Use Policy, and a concern that during this investigation that acts of a criminal nature could be found … The individual's Security Clearance was suspended. We understand this morning it is being reinstated. However, we feel it should remain suspended until the outcome of our current investigations have been concluded … Our Security Controller and the HoE both recommend that his security clearance should be withdrawn or at least suspended pending the completion of our investigation as well as any reinvestigation that you undertake."
43. On the same day (18 January 2021) the respondent also submitted an alert to the MoD on the MODNet in connection with what it perceived to be a breach of IT security. Mrs Jemmett

also wrote to the claimant on that day to confirm that the respondent was not yet in a position to allow him to return to work.

44. The claimant accepted in cross examination that it was reasonable and legitimate of Mrs Jemmett to have submitted this Second AIR when she had been advised to do by the UK vetting agency.
45. On 19 January 2020 the claimant emailed a letter to Mrs Jemmett which was his second formal grievance. He complained that his security clearance had been reinstated but then cancelled again, and he requested confirmation as to what information been sent to the MoD and who was responsible for the cancellation of the security clearance. The claimant also complained that he had been unable to resume his full contractual duties and overtime despite an earlier recommendation from occupational health that following a phased return to work this would be acceptable.
46. On 29 January 2021 the claimant sent a further email to Mrs Jemmett. The claimant relies upon this email as his second protected public interest disclosure. He repeated his disclosures about Mr Cates and his allegations that Mr Cates had been in breach of the mobile phone regulations. He also requested that the respondent disclosed to him copies of the original images which Mr Cates had made. He continued to allege serious breach of site safety rules.
47. Meanwhile the respondent had instructed Mr Westell of Outset (UK) Ltd, who are independent HR advisers, to investigate and prepare a report in reply to the claimant's appeal against the rejection of his first grievance. Mr Westell discussed this with the claimant before finalising his report, and the respondent subsequently sent this report to the claimant on 12 February 2021. Mr Jackson arranged a grievance appeal hearing for 23 February 2021.
48. Mrs Jemmett remained concerned about the claimant's conduct and on 12 February 21 the claimant was suspended on full pay pending a disciplinary investigation. Mrs Jemmett instructed Ms Conner of Outset (UK) Ltd to carry out the disciplinary investigation. The claimant asserts that his suspension and the instructions to carry out a disciplinary investigation were detriments which he suffered on the grounds that he had made protected public interest disclosures.
49. Mr Jackson the respondent's Chief Executive chaired the grievance appeal meeting which had been arranged for 23 February 2021. The claimant was accompanied by his trade union representative Mr Richards. They discussed the various points which had been raised by the claimant. The claimant then asserted that there was corruption within the respondent's organisation and that Mr Jackson was aware of it. No further information was provided at that time, although the claimant now says it relates to the unauthorised sale of IT equipment. The claimant relies upon these verbal assertions as his third protected public interest disclosure. Mr Richards (the claimant's trade union representative) recommended to the claimant that he should concentrate on his grievance appeal and that any other alleged corruption issues could be dealt with by way of a further whistleblowing process, and that mediation was clearly needed to help to repair the relationship between the claimant and Mr Cates. Mr Jackson agreed with Mr Richards. As a result of these allegations Mrs Jemmett subsequently instructed Mr Westell of Outset (UK) Ltd to investigate the allegations of corruption, and for Ms McIntosh of that organisation to take over the investigations into the second grievance instead of Mr Westell.
50. The claimant gave no evidence to this tribunal as to what he said to Mr Jackson. The minutes of the relevant meeting show that there was a general allegation of corruption but nothing more specific. The claimant did not give evidence as to the nature of any legal obligation which he said might have been breached or any criminal offence which might have been committed. Neither did the claimant give any evidence as to why he believed that any such allegation was in the public interest. In addition, the claimant chose not to pursue the matter through the whistleblowing policy to which he had been directed.
51. One of the allegations of corruption which was subsequently raised by the claimant was that some of the respondent's managers were selling computer equipment such as laptops at a discounted rate to other members of staff. Mr Jacobs accepts that some employees had purchased obsolete phones or computer equipment which were no longer of any use

to the respondent. Mr Jacobs had what he believed was a reasonable way of valuing various unwanted items and selling them to colleagues, and that the money received in payment was deducted from the pay of anyone who bought equipment, so it all remained transparent. This was particularly necessary given that the respondent is a heavily audited organisation. In any event from September 2020 the respondent had an IT Disposal Policy which set out a structure for what was already happening in practice.

52. To assist the investigation into the suggested corruption which Mr Westell was carrying out, Mrs Jemmett decided to look for an audit trail of the various purchases to check that money for the IT equipment had been properly deducted from salaries of the employees purchasing them, to check that it was properly recorded in the payroll records. The claimant had earlier raised the issue that an employee had purchased a Surface 3 laptop in January 2020 for £200. Mrs Jemmett discovered that an employee Mr Szeles had purchased the Surface 3 laptop in January 2020 for £200, which had been recorded correctly. However, Mrs Jemmett decided that it was surprising that the claimant would know about this because Mr Szeles is a Depot Manager in one of the Scottish depots and the claimant was based at the other end of the country in the Thanckes depot.
53. Mrs Jemmett decided to check the claimant's sent mailbox for emails which he had sent to his personal email address. She discovered one such email dated 26 March 2020 which the claimant had sent from his work email account to his personal email address. It had an attachment which was the form P60 of Mr Jacobs the IT Infrastructure Manager. These are password protected when sent to the individual employees in question and this must therefore have been taken from Mr Jacobs' inbox.
54. Mrs Jemmett was alarmed by this discovery. She considered that it was unlawfully obtaining or accessing personal data which is a criminal offence, and that if personal data falls into the wrong hands it can expose an individual to risk of identity fraud or theft. In addition, it appeared that the claimant had accessed this P60 and had sent it to himself almost a year earlier. She telephoned Mr Jackson the Chief Executive and they agreed that they should convene an Audit and Risk Assurance Committee meeting as soon as possible. This meeting then took place on 1 March 2021 and agreed on a number of actions, including submitting a Third Aftercare Incident Report, reporting the events to the MoD, and reporting the data breach to the Information Commissioner's Office.
55. Mrs Jemmett submitted this Third Aftercare Incident Report on 1 March 2021. It stated: "on 13 January 2021 we discovered that AK had breached our IT systems whilst not at work as his security clearance had been suspended whilst under investigation following an AIR report in October 2020 … On Friday 26/02/2021 we discovered that he obtained a copy of the Infrastructure Manager's 2020 P60 and he has forwarded this official document from his OPA email address to his personal email account. He did this on 26/03/2020. This is a serious breach which has been reported to the ICO today. We have also reported this to the Confidential Hotline for the Defence Irregularities Reporting Unit. We strongly believe the Police need to be involved. P60 information can be used to steal someone's identity and commit fraud. We are delaying the disciplinary investigation as we do not want him tipped off that they are involved in the event he hides or destroys evidence, but we can only do this for a limited period … Significant risk given that he has obtained information to which he is not entitled within OPA system …"
56. Meanwhile the claimant made a verbal report to an MoD Confidential Hotline. This was acknowledged in a letter from the MoD to the claimant dated 4 March 2021 which confirmed: "Your concern will be passed to the appropriate area for investigation". The claimant relies on this disclosure to the MoD as his fourth protected public interest disclosure. However, the claimant gave no evidence to this tribunal as to what information he says he disclosed to the MoD, nor what legal obligation is said to have been breached and/or what criminal offence is said to have been committed, and he gave no evidence to the effect that he believed that any such disclosure was in the public interest.
57. By letter dated 5 March 2021 Mr Jackson then wrote to the claimant to confirm his decision in reply to the claimant's appeal against his first grievance. The grounds for appeal had been that the claimant had been subjected to bullying and intimidation by line management and that Mr Cates had referred to the claimant in a derogatory manner. Mr Jackson also

considered number of other new complaints which have been raised during the course of the process. Mr Jackson's conclusion was that Mr Cates had been intimidatory and derogatory at the meeting on 26 May 2020, and that these first two allegations were partially upheld, but noting that Mr Cates' conduct was in reply to the claimant's own antagonistic behaviour and deliberate goading. Mr Jackson also confirmed that when discussing new vacancies with the Operations Manager he had stated that he did not want any military or ex-military people as candidates, which had prompted a further complaint by the claimant. Otherwise, the claimant's complaints were all dismissed. Mr Jackson also suggested that mediation should take place between the claimant, Mr Cates and the Operations Manager (as suggested by the claimant's own trade union adviser), and also that the local management on site should undergo people management coaching. The claimant did not accept this offer of mediation.

58. Shortly thereafter Ms McIntosh completed her report into the claimant's second grievance on 16 March 2021. The respondent had appointed its Regional Operations Manager (Scotland) Mr Johnson to determine this second grievance. He considered the report and wrote to the claimant on 22 March 2021 with his grievance outcome. In reply to the claimant's three grounds of complaint Mr Johnson determined (i) that the suspension of the claimant's security clearance on 4 November 2020 was not because of "untrustful" information, nor done maliciously; (ii) that despite an assertion to the contrary Mr Lauder had responded in detail to various questions raised of him by the claimant; and (iii) that despite the claimant's complaint about not being allowed to work overtime as recommended by Occupational Health, the respondent had instead followed all the recommendations from Occupational Health who had advised that the situation should be kept under review.
59. The claimant responded the next day by appealing against the rejection of the second grievance. He also made a further verbal report to the MoD Confidential Hotline. This was acknowledged in a letter from the MoD to the claimant dated 25 March 2021 which confirmed: "your concern will be passed to the appropriate area for investigation". The claimant relies on this disclosure to the MoD as his fifth protected public interest disclosure. However, the claimant gave no evidence to this tribunal as to what information he says he disclosed to the MoD, nor what legal obligation is said to have been breached and/or what criminal offence is said to have been committed, and he gave no evidence to the effect that he believed that any such disclosure was in the public interest.
60. The claimant's appeal against his second grievance was considered by the respondent's Finance Manager Mrs R Barry. She determined (i) that the AIR had been raised because of the result of numerous "uncharacteristic" behaviours on the claimant's part as evidenced by numerous staff members, which was an appropriate course of action, and not because of any assertions of corruption; (ii) secondly that the AIR had not been raised because of any activity by the claimant as a safety representative; (iii) thirdly that the AIR was not submitted simply because the claimant had put in a grievance appeal; and (iv) she could not accept the claimant's factual criticisms of Mr Johnson's report. For these reasons the claimant's appeal against the rejection of his second grievance was also dismissed.
61. Meanwhile Ms Conner of Outset (UK) Ltd finalised her disciplinary investigation report and sent it to the respondent on 25 March 2021. By letter dated 8 April 2021 the claimant was invited to a disciplinary meeting to take place on 22 April 2021. The claimant asserts that this was a detriment which he suffered on the grounds of having made protected public interest disclosures.
62. Mrs Jemmett's letter dated 8 April 2021 to the claimant made it clear that the claimant was facing allegations of gross misconduct which might result in his dismissal without notice or pay in lieu of notice. It notified him that he was entitled to be accompanied by fellow employee or trade union representative. The claimant was provided with Ms Conner's full report and its enclosures and any other relevant documents involved, and these were also sent to Mr Richards the claimant's trade union representative. There were a number of allegations which were set out in detail, each of which amounted to potential gross misconduct under the respondent's disciplinary procedure.

63. The first allegation which the claimant was required to face was a serious breach of the Information Systems Acceptable Use Policy, which in particular involved significant IT activity on the respondent's network by the claimant (64 days in a row and 365 occasions) during the period when his security clearance had been suspended from 5 November 2020 to 15 January 2021 and after it was made clear to the claimant that he was not required to work and did not have access to the respondent's network. The second allegation was one of theft, namely taking Mr Jacob's P60 without his permission or consent. The third allegation was various breaches of confidentiality, security procedures, the Information Systems Acceptable Use Policy, and persistent breaches of the terms of employment, in particular relating to removing transmitting or storing files of documents which belonged to the respondent without proper authorisation, including breach of the respondent's Data Protection Policy. The fourth allegation was refusal to carry out reasonable management instruction and/or a wilful neglect or refusal to carry out duties, having deliberately taken a copy of a document which he had been instructed to delete. The fifth allegation was a breach of the respondent's Fundamental Principles to act with integrity. The sixth was any action which results in negative publicity for the respondent, or which brings the respondent's reputation into disrepute, or by its nature makes an employee unsuitable to continue in the role. The seventh allegation was a breach of the respondent's Code of Conduct particularly with regard to integrity and honesty. The eighth and final allegation was that there were reasonable grounds to believe in the foregoing allegations which would then raise serious doubts over the trust that was required between employee and the respondent.
64. Mr Ian Lindsay, from whom we have heard, is the respondent's Asset Integrity Director. He had not had any previous dealings with the claimant, and he was asked to chair the disciplinary investigation against the claimant and had access to all the relevant documents which had been sent to the claimant and his trade union representative. The proposed disciplinary hearing was postponed at the request of the claimant's trade union representative. The hearing was rearranged for 30 April 2021, and the letter confirming this on 21 April 2021 included further evidence of examples of serious breach of the Information Systems Acceptable Use Policy and a new allegation of time wasting. This included a number of examples of activities which the claimant had been engaged in work which did not form part of his contractual work duties.
65. At the commencement of the rearranged meeting on 30 April 2021 the claimant suddenly stated that he no longer wished to be represented by Mr Richards his chosen trade union representative. Mr Lindsay was of the view that the allegations were very serious, and he was reluctant to continue if the claimant did not have a well briefed representative to assist him. He decided to postpone the hearing to allow sufficient time for the claimant to appoint and to brief an alternative representative. The claimant agreed with that proposal. He also subsequently emailed Mr Lindsay on 6 May 2021 to request that the meeting be postponed further pending investigations by the MoD into the suspension of his security clearance. Mr Lindsay refused that request and decided to continue because the hearing had already been rescheduled twice. The claimant subsequently agreed to that course of action.
66. The hearing took place remotely by Teams video on 7 May 2021. The claimant had a newly appointed representative namely Mr Springbett who is a regional trade union officer with Unite. The various allegations were discussed in detail and the claimant was given an opportunity to state his case in response to the allegations. In reply to the allegation that the claimant had sent Mr Jacob's P60 to his personal email address the claimant denied doing this. He said that the time of the email showed that it happened outside of his working hours and that one of the managers at the Thanckes depot must have transferred the P60 from the claimant's work email to his own personal email and then accessed the claimant's personal email account to delete it. Mr Lindsay checked that assertion during a short break and pointed out to the claimant that he was in fact on site at the relevant time the P60 was emailed from his work account to his personal email account. The claimant worked overtime on that day and had made a claim for the overtime which covered the time when the email was sent. The claimant still denied sending it and accused one of the managers of having done it. The parties then agreed to adjourn the hearing so that Mr Lindsay could

make further investigations in reply to that and the other points which had been raised on behalf of the claimant.

67. Following a further exchange of emails which Mr Lindsay felt would be better discussed at the hearing, the reconvened hearing commenced on 18 May 2021. Mr Springbett was again present to represent the claimant. Mr Lindsay asked the claimant about the reanimation of his disabled account and explained that only by anonymising the claimant's account was the respondent able to stop the automatic reanimation of that account. He told the claimant that 151 accounts had previously been disabled and none had been reanimated, that the IT service provider Content + Cloud confirmed that it was a targeted reanimation; and Microsoft had confirmed that it could not be a glitch. The claimant was only able to say that he was unable to explain it.
68. The meeting then discussed the sending of Mr Jacob's P60 again. Following investigations during the postponement of the hearing it had become clear that only the claimant and Mr Bond were on site at the time the P60 was sent. The claimant maintained his position that Mr Kerslake or another had defeated the respondent's entry system and remained on site covertly and carried out the steps which were required to find and send the P60 from the claimant's work email to his own personal email, and then deleting it from the claimant's personal email account before leaving the site undetected. Mr Lindsay did not accept this extraordinary suggestion, and he did not find it credible that Mr Kerslake (who in any event was on leave at the time) or anyone other than the claimant had sent Mr Jacob's P60 to the claimant's personal email address.
69. The claimant also asserted that Mr Kerslake was accessing pornography on the work system which could have caused the IT glitch. However, the respondent's computer system had system protection in place to prevent access to any pornographic material.
70. Following this detailed process Mr Lindsay reached the following conclusions. Based on the evidence from Content + Cloud, Microsoft, and Mr Jacobs, Mr Lindsay concluded that the claimant had been responsible for and involved in several illegitimate reanimations of his account after it had been disabled. He determined that the claimant had deliberately downplayed his IT skills during the disciplinary hearing, and he was the only person with any motive to have repeatedly reactivated his disabled account. He found that the claimant only ever wrote to the respondent from his personal email address having been told that his access was disabled, but that this was to avoid detection because he was still accessing the work system when he knew that he should not have been. Mr Lindsay found that there were serious and repeated breaches of the respondent's Information Systems Acceptable Use Policy as well as other examples of gross misconduct. Mr Lindsay found the claimant's behaviour to have been "deeply unsettling". He determined that the claimant had been clearly told that he was not to have access to the respondent's system in order to comply with instructions from the MoD, but nonetheless he continued to access the system because, in his own words, he was "looking for answers". Mr Lindsay decided that the claimant was not someone whom the respondent ought to continue to employ. He considered sanctions short of dismissal but given that this would require the claimant returning to the workplace this would have involved a continuing working relationship with no trust and confidence, which he considered to be unthinkable. Mr Lindsay genuinely believed that the claimant had committed repeated acts of gross misconduct and that summary dismissal was the only appropriate sanction.
71. Mr Lindsay rejects the allegation that the protected public interest disclosures relied upon by the claimant were the reason, or if more than one, the principal reason for his dismissal. None of the disclosures were made to Mr Lindsay and they did not influence his decision. We find that the reason for the claimant's dismissal were repeated acts of gross misconduct, and not because of any protected public interest disclosures.
72. Mr Lindsay confirmed the claimant's summary dismissal for gross misconduct, together with his detailed reasons, in a letter to the claimant dated 26 May 2021. The claimant was afforded the right of appeal under the respondent's disciplinary procedure. By letter dated 1 June 2021 the claimant appealed against the decision to dismiss him. The claimant gave as his reasons that he did not hack or reanimate the respondent's IT system because he did not have the knowledge or capability to do it. He also denied taking Mr Jacobs P60. He

blamed the circumstances on a fault within the IT system and said that he informed Mr Kerslake of the same. He again asserted that he was being punished for bringing corruption within the respondent's organisation to everyone's attention. By email dated 3 June 2021 Mr Springbett the claimant's trade union representative emailed Mrs Jemmett to add the following succinct grounds of appeal: (i) the facts surrounding the case were incorrect or misinterpreted; (ii) procedures were not correctly followed; and (iii) the sanction of dismissal was too harsh in the circumstances when other sanctions were available.

73. The claimant's appeal was determined by Mr Jackson the respondent's Chief Executive. Other than agreeing to commission the original investigation into the claimant's conduct, Mr Jackson had played no part in the disciplinary process. The appeal hearing took place on 10 June 2021, and the claimant attended and was represented by Mr Springbett. They discussed each of the points raised by the claimant in turn, and no new evidence was adduced by the claimant.
74. Mr Jackson considered all of the evidence before him in detail but concluded, as Mr Lindsay had done after the disciplinary hearing, that the claimant was guilty of multiple acts of gross misconduct. He considered alternative sanctions but agreed that dismissal was the appropriate sanction in the circumstances.
75. Mr Jackson rejected the claimant's appeal, and he confirmed his reasons in a detailed letter dated 23 June 2021. This addressed the grounds of appeal in turn namely that (i) the claimant did not break/hack or animate the respondent's IT system; (ii) his dismissal was a direct result of an IT fault which the various managers had planned in advance; (iii) that the facts surrounding the case were incorrect or misinterpreted; (iv) the procedures were not correctly followed; and (v) that the sanction of dismissal was too harsh in the circumstances. Mr Jackson confirmed in particular that Mr Lindsay had clear and reasonable grounds to conclude that the claimant had breached the Information Systems Acceptable Use Policy, not least by gaining unauthorised access and re-animating his account; that he had dishonestly obtained and had made unauthorised use of Mr Jacobs' P60; that there was a serious breach of both confidentiality and data protection; and that the claimant had deliberately ignored a management instruction not to access the respondent system. He concluded that there were multiple examples of gross misconduct and that the procedure adopted was fair and reasonable. The claimant had been given every opportunity to state his case against the various allegations in the presence of his chosen trade union representative. Mr Jackson also considered the appropriate sanction.
76. Mr Jackson made the following comments in his letter: "I have assessed the evidence with an open mind, forming my own view having applied the appropriate test of the balance of probabilities to each allegation. Despite having the opportunity to fully state your case at the disciplinary hearing and again at the appeal stage, I do not find your explanations in the case you put forward credible. There are multiple allegations which amount to gross misconduct, and you have not provided any new evidence or information at this appeal stage that would make me change the decision made by Ian Lindsay following the disciplinary hearing. I am not of the view that a dismissal in the circumstances was too harsh. Any lesser sanction would have involved employment continuing at the OPA and given the seriousness of the findings against you and the complete lack of trust and confidence there is in you at all levels of management in the business now, I find that to terminate your employment summarily was entirely appropriate. As stated earlier I have made the decision to dismiss your appeal."
77. The claimant has asserted that the decision to dismiss him was a foregone conclusion as proven by the respondent's formal accounts. Mr Jackson the Chief Executive is also the Accounting Officer responsible for the respondent's accounts which are audited by the National Audit Office and then laid before Parliament. The respondent's year-end is to 31 March annually. Mr Jackson signed off the accounts to 31 March 2021 in December 2021 but also reported that there had been a cyber security breach and that the relevant individual had been dismissed. The claimant argues that because his dismissal was in May 2021 this report shows that the decision to dismiss him had already been taken prior to the end of March 2021. We reject that argument, and we accept Mr Jackson's evidence that it was appropriate for him to include in his report significant events which had taken place

between the end of the year ended March 2021 and his signing of the statement to accompany the accounts in December 2021.

78. Finally, we make the following findings of fact with regard to the claimant's conduct. We have been led through a forensic examination of the claimant's actions by reference to the email and computer records which were obtained before and during the disciplinary investigation. This includes the investigations undertaken by Mrs Jemmett, Mr Jacobs, the IT service provider, and Microsoft/Mimecast. It is clear to us on the balance of probabilities, and we so find, that despite clear instructions to the contrary, which he fully understood, the claimant gained unauthorised access to the respondent's secure IT system for a number of months, and deliberately set out to deceive the respondent to the contrary. In addition, during this time the claimant gained unauthorised access to Mr Jacobs' personal account and information, and deliberately sent Mr Jacobs' form P60 to his personal email account. The claimant continued to deny (despite the weight of evidence against him) that he had acted in this matter, but he did accept in cross examination that if he had gained unauthorised access to Mr Jacobs' P60 and sent it without authority to his personal email account, then that would have amounted to gross misconduct for which he would normally expect to be dismissed.
79. It is clear to us, and we so find, that both Mr Lindsay the dismissing officer Mr Jackson the appeal officer genuinely believed that the claimant had committed gross misconduct. It is also clear to us, and we so find, that it was entirely reasonable for them both to have formed that conclusion. Indeed, the evidence before them was such that this conclusion was inescapable. We have considered the same evidence in detail, and for the record we also find on the balance of probabilities that the claimant committed gross misconduct, not least because it is clear that he gained unauthorised access to the respondent's IT system despite being clearly instructed to the contrary, and that he deliberately accessed Mr Jacobs' form P60 which he then sent to himself without authority.
80. In addition, the claimant made it clear that he was of the view that there was an irretrievable breakdown of trust and confidence between him and the respondent's managers from as long ago as the events of May 2020.
81. As for these proceedings, the claimant commenced the Early Conciliation process with ACAS on 9 August 2021 (Day A), and the Early Conciliation Certificate was issued on 27 August 2021 (Day B). The claimant presented these proceedings on 23 September 2021. There was a case management preliminary hearing on 24 May 2022 and the issues to be determined at this hearing were agreed in general terms, subject to further information which the claimant agreed to provide relating to some of those agreed issues. Following this process, the claims which we have determined are set out below.
82. Having established the above facts, we now apply the law.
83. The Law:
84. Unfair Dismissal Generally:
85. The reason relied upon by the respondent for the claimant's dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
86. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
87. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
88. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT;and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR.

89. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
90. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
91. Protected Public Interest Disclosures:
92. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
93. Under Section 43C(1) of the Act a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
94. Under section 43H of the Act a qualifying disclosure is made if the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; it does not make the disclosure for purposes of personal gain; the relevant failure is of an exceptionally serious nature; and in all the circumstances of the case, it is reasonable for him to make the disclosure. Under section 43H(2) in determining for these purposes whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.
95. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
96. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
97. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

98. We have considered the following cases: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ; Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018 Ibrahim v HCA International Ltd [2019] EWCA Civ; Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401 IDS Brief 1073 July 2017 p8. The tribunal directs itself in the light of these cases as follows.
99. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.
100. [24] "As for the words "in the public interest", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).
101. As also held in Chesterton: The following four factors might be relevant – the numbers in the group whose interest the disclosure served; the nature of the interest affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer. See also Dobbie v Felton t/a Feltons Solicitors EAT 0130/20 IDS Brief March 2021 1135 p 15
102. In whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.
103. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."
104. Public Interest Disclosure Detriment:
105. Detriment is to be interpreted widely: see Warburton v the Chief Constable of Northamptonshire Police [2022] EAT - it is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken

by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

106. Direct Race Discrimination:

107. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.

108. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

109. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

110. We have considered the cases of; Chapman v Simon [1994] IRLR 124; Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Hewage v Grampian Health Board [2012] IRLR 870 SC; London Borough of Islington v Ladele [2009] IRLR 154; Ayodele v Citylink Ltd and Anor CA [2017].

111. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed and/or suffered the same allegedly less favourable treatment as the claimant.

112. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

113. The Issues in This Case

114. The issues to be determined by the tribunal were set out in summary in the case management order dated 24 May 2022, with the requirement that the claimant should provide in some instances further information relating to those specific matters. As a result of this process the claimant's claims are limited to these agreed issues. The claimant relies on five public interest disclosures and he asserts that the reason (or if more than one the principal reason) for his dismissal was because he made these disclosures. He also asserts that he suffered five detriments on the grounds of having made these disclosures. The claimant also asserts in general terms that his dismissal was unfair. In addition, the claimant brings a claim of direct race discrimination because of his Latvian nationality which is limited to four allegations. These issues are now described in more detail below, with our findings in each case.

115. The Public Interest Disclosures:

116. The claimant relies on five disclosures, and our findings as to whether these were protected public interest disclosures are as follows:

117. Disclosure 1: This is the claimant's email to the respondent dated 17 December 2020. In this email the claimant complained to Mrs Jemmett that Mr Cates had been deliberately breaching site safety rules since November 2013 in relation to the restrictions on using mobile phones, which claimant asserted he had done in order to take photographs. The claimant referred to a number of specific photographs. We accept that the claimant disclosed information tending to show that there had been a breach of a legal obligation. The claimant did not specifically give evidence to the effect that he held a reasonable belief that the disclosure was in the public interest, but it clearly was in the public interest that the risk of ignition is controlled in a fuel depot and so on balance we give the claimant the benefit of the doubt on this point. In any event the respondent has conceded that the claimant did make a protected public interest disclosure by way of this email. The respondent has helpfully referred to the case law which encourages us to avoid becoming too "bogged down" on the technicalities as to whether there was a disclosure, when the respondent asserts that the real issue in this case is the lack of causation between any alleged disclosure and the detriments or dismissal relied upon.

118. We find that this email satisfied the provisions of section 43B(1)(b) of the Act, and that it was a public interest disclosure. It became a protected public interest disclosure by virtue of section 43C(1)(a) of the Act because the claimant made this disclosure to his employer. We find therefore that the claimant has the protection of the relevant whistleblowing legislation with effect from this email on 17 December 2020.

119. Disclosure 2: The claimant effectively repeated this disclosure by virtue of his email to Mrs Jemmett of the respondent dated 29 January 2021. The respondent also concedes that this was a protected public interest disclosure. We agree with that concession, and we so find, for the same reasons as those set out for Disclosure 1.

120. We do not accept that the remaining three disclosures relied upon were protected public interest disclosures for the following reasons.

121. Disclosure 3: This is a verbal disclosure to Mr Jackson of the respondent said to have been made on 29 January 2021. This took place during the grievance appeal hearing at which stage the claimant accused Mr Jackson of "corruption". In fact the correct date for this was 23 February 2021. The claimant gave no evidence to this tribunal as to what he said to Mr Jackson. The minutes of the relevant meeting show that there was a general allegation of corruption but nothing more specific. The claimant did not give evidence as to the nature of any legal obligation which he said might have been breached or any criminal offence which might have been committed. Neither did the claimant give any evidence as to why he believed that any such allegation was in the public interest. For all these reasons we cannot find that the claimant made a disclosure of information which tended to show that there had been a breach of legal obligation or alternatively the commission of a criminal offence, nor that he had a reasonable belief that any such disclosure was in the public interest.

122. Disclosure 4: This is a verbal disclosure to the MoD said to have been acknowledged by the MoD in its letter of 4 March 2021. However, the claimant gave no evidence to this tribunal as to what information he says he disclosed to the MoD, nor what legal obligation is said to have been breached and/or what criminal offence is said to have been committed, and he gave no evidence to the effect that he believed that any such disclosure was in the public interest. Even if there were a public interest disclosure is unclear how this might become protected. The disclosure was not made to the claimant's employer and so section 43C(1)(a) cannot apply. The MoD is not in the schedule of prescribed persons for the purposes of section 43F. If the claimant seeks to rely on section 43H we have heard no evidence as to why the disclosure is substantially true, why it is said to have been of an exceptionally serious nature, and why it was reasonable to make the disclosure in the first place. In these circumstances we cannot find that this verbal disclosure to the MoD amounted to a protected public interest disclosure.

123. We reach the same conclusion for exactly the same reasons in respect of Disclosure 5, which is a further disclosure to the MoD said to have been acknowledged by

the MoD in its letter of 25 March 2021. The claimant has simply not discharged the burden of proof that these two disclosures to the MoD satisfied the necessary legal test to make them protected public interest disclosures.

124. Public Interest Disclosure Detriment - s 47B of the Act:

125. The claimant asserts that he has been subjected to detriment on five occasions, and our findings as to whether these were detriments, and whether they were on the grounds of the two protected public interest disclosures, are as follows.

126. Detriment 1: This is the respondent submitting an AIR in October 2020 (the First AIR"). Although this may well have been a detriment, it arose before Disclosure 1 on 17 December 2020, and it cannot therefore be said to have been a detriment on the grounds of any protected public interest disclosure. For this reason, we dismiss this first claim of detriment.

127. The respondent concedes that the remaining four detriments all amounted to detriments within the meaning of section 47B of the Act. Applying Warburton v the Chief Constable of Northamptonshire Police [2022] EAT detriment is to be construed widely, and we agree that the submission of an AIR which might result in some sanction such as the suspension of security clearance; the act of suspension to commence a disciplinary process; and that disciplinary process itself which might potentially lead to dismissal, all amounted to detriments. The key question in this case is the extent to which any one or more of these detriments was on the grounds that the claimant made his two protected public interest disclosures. Another way of putting it is whether the disclosures had a material influence on the respondent's acts which gave rise to these detriments (applying for instance Fecitt).

128. Detriment 2: This is the respondent submitting an AIR on 18 January 2021 (the Second AIR"). It was only the first protected public interest disclosure (Disclosure 1) on 17 December 2020 which predated this detriment. It seems clear to us, and we so find, that the submission of this Second AIR was in no way linked to this Disclosure 1, and that it was submitted for the reasons set out in that AIR. These were events which occurred immediately preceding the submission of that AIR, and not because of the email (Disclosure 1) one month earlier which was already being addressed separately in the same way as the claimant's other health and safety complaints were addressed. New events had come to light. There was the discovery that (i) the claimant was giving evidence for a disgruntled former employee and that he had provided that employee with confidential information without authorisation; (ii) that a former colleague of the claimant had alleged that the claimant had gained unauthorised access to his previous employer's computer systems and had attempted to blackmail that company; (iii) the discovery in the two to three days previously that the claimant had apparently gained repeated access to his disabled email account in breach of clear instructions to the contrary; (iv) the news on 18 January 2021 that his security clearance had been reinstated; and (v) the fact that Mrs Jemmett was instructed to raise the AIR by the relevant UK Security Vetting case officer at the MoD.

129. We find that there was no causal link between Disclosure 1 and this detriment, and nor can this detriment be said to have been materially influenced by Disclosure 1, and for this reason we dismiss this claim of public interest disclosure detriment.

130. Detriment 3: This is the respondent submitting an AIR on 1 March 2021 (the Third AIR"). This detriment arose after both protected public interest disclosures. However, it is clear to us, and we so find, that this Third AIR was caused solely by Mrs Jemmett's discovery on 26 February 2021 that the claimant had forwarded Mr Jacobs' P60 from his work account to his personal account nearly a year previously on 26 March 2020. This was of a matter of such grave concern that an emergency meeting was convened of the Audit and Risk Assurance Committee. That Committee determined that it was appropriate to report the matter as an AIR. The MoD confirmed independently to Mr Jackson that an AIR should be raised.

131. For these reasons we find that there was no causal link between Disclosures 1 and 2 and this detriment (Detriment 3) and this detriment cannot be said to have been materially influenced by Disclosures 1 and/or 2, and for this reason we dismiss this claim of public interest disclosure detriment.

132. Detriment 4: This is suspending the claimant on 12 February 2021 pending investigation. We find that the claimant's suspension was wholly as a result of the discovery by the respondent of apparent gross misconduct on the part of the claimant. At that stage the respondent was aware of the following matters which caused great concern: (i) the claimant was directed on 5 November 2020 that the MoD had suspended his security clearance and that he must not be allowed access to certain material; (ii) on 5 November 2020 the claimant was also told that his account was being disabled in order to implement the MoD's wishes; (iii) the respondent did then disable the claimant's account on 5 November 2020; (iv) the claimant's account was then reanimated in unclear circumstances; (v) on 16 November 2020 the claimant was given written confirmation that his account had been disabled to implement instructions from the MoD; (vi) despite these clear instructions the claimant accessed his account 359 times; he forwarded 95 emails from his work account to his personal account; and he failed to inform the respondent that he still had access to his emails in clear breach of both the respondent's and the MoD's instructions; and (vii) despite the fact that the claimant's account was disabled repeatedly on 13 January 2021 it was repeatedly reanimated through an administration account which was vulnerable to having been hacked.

133. We find that it was an entirely reasonable reaction on the part of the respondent to suspend the claimant when in possession of this information. This was the reason for the claimant's suspension. We find that his suspension was not caused by, nor materially influenced by, either of his protected public interest disclosures. For this reason we dismiss this claim of public interest disclosure detriment.

134. Detriment 5: This is commencing an investigation and disciplinary action into the claimant's conduct. On 12 February 21 the respondent instructed Ms Conner to commence a disciplinary investigation into the claimant's conduct. We find that the respondent took this action, and because this detriment, for the reasons set out in findings above under Detriment 4, namely the significant amount of information which had come to light to indicate that the claimant had committed repeated and serious acts of gross misconduct. We find that the commencement of this disciplinary investigation was not caused by, nor materially influenced by, either of his protected public interest disclosures. For this reason, we also dismiss this claim of public interest disclosure detriment.

135. In conclusion therefore the claimant's claims for detriment on the grounds of having raised protected public interest disclosures under section 47B of the Act are all hereby dismissed.

136. Automatically Unfair Dismissal - section 103A of the Act

137. For the detailed reasons which now follow we find that the reason for the claimant's dismissal was gross misconduct. We reject the assertion that the reason, or if more than one, the principal reason for the claimant's dismissal in May 2021 was because he had made his two protected public interest disclosures by email some four to five months previously. Mr Lindsay the dismissing officer, and Mr Jackson the appeal officer, gave clear and cogent evidence to the effect that the sole reason for the claimant's dismissal was the repeated acts of gross misconduct. They were not challenged on this evidence, and the claimant did not put to them his allegation that these disclosures were the reason for his dismissal.

138. We cannot find that the decision to dismiss the claimant was in any way materially influenced by his protected public interest disclosures. His protected public interest disclosures were not the sole or principal reason for his dismissal. For these reasons we dismiss the claimant's claim for automatically unfair dismissal under section 103A of the Act.

139. Ordinary Unfair Dismissal section 98(4) of the Act

140. We find that the reason for the claimant's dismissal was gross misconduct. This is clear from our findings of fact above to the effect that Mr Lindsay and Mr Jackson both genuinely believed that the claimant had committed gross misconduct, which is based on overwhelming evidence to that effect.

141. We have also found that it was entirely reasonable for both Mr Lindsay the dismissing officer, and Mr Jackson on appeal, to hold the belief that the claimant had

committed gross misconduct. There are a number of reasons for this: (i) the claimant repeatedly accessed the respondent's network between November 2020 and January 2021 when he knew full well that the respondent had instructed him not to do so; (ii) he deliberately decided not to inform the respondent of his continued access and deliberately deceived the respondent into thinking that he did not have access; (iii) the claimant's assertion that he was not behind the reanimation of his account was entirely implausible in circumstances where he disagreed strongly with the fact that his access had been disabled, he wanted access to gather evidence to meet any MoD investigation, and no one else had any motive for seeing his account reanimated; (iv) the evidence clearly indicated that he had also hacked into Mr Jacobs' account; (v) the claimant was unable to provide an excuse for failing to tell Mr Jacobs that he continued to receive his emails and had access to his account; (vi) the claimant's explanation for his actions was entirely implausible, in that it was to the effect that one of the respondent's managers had hacked into the claimant's office account in order to send Mr Jacobs' P60 to the claimant's personal account, and then hacked into the claimant's personal account in order to delete the email which attached the P60, and all done merely to frame the claimant dishonestly. In addition, all of the above was done in a security critical environment and in clear breach of the respondent's policies including its disciplinary policy.

142. For these reasons we find that the respondent's genuine belief that the claimant had committed gross misconduct was based on reasonable grounds. We have no hesitation in rejecting the claimant's assertion that the evidence against him was fabricated by unnamed managers of the respondent and that there were no grounds for his dismissal.

143. In addition, we find that the respondent's belief that the claimant had committed gross misconduct followed a full and fair disciplinary investigation. Initially Ms Conner prepared a detailed investigation report which was passed to a senior manager (Mr Lindsay) in order that he could chair the disciplinary hearing. Mr Lindsay had had no previous involvement in the matters relating to the claimant. The claimant was aware of the detail of the allegations against him and that they might result in his dismissal. He was afforded the right to be accompanied by a trade union representative. The hearing was adjourned at the claimant's request and adjourned again to ensure that he had the advantage of experienced trade union representation. He was provided with all the relevant documents and he and his trade union representative had every opportunity to state his case against the allegations put to him. He was afforded the right of appeal against the decision to dismiss him which was determined by the respondent's most senior officer Mr Jackson who had not been previously involved in the disciplinary process.

144. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

145. On the facts of this case, given the security critical environment of the respondent and the many serious and repeated acts of gross misconduct committed by the claimant, including significant and sophisticated IT security breaches, we have no hesitation in deciding that dismissal was within the band of responses reasonably open to this respondent when faced with these facts. The respondent has submitted that in terms of sanction, dismissal was not only within the range of reasonable responses, but effectively it was the only response reasonably open to the respondent. We do not disagree with that conclusion, and we also note that the claimant has asserted throughout that there was a complete breakdown of trust and confidence between him and the respondent's managers from as long ago as the events of May 2020. It seems incongruous that the claimant should argue that it was not a reasonable response for the respondent to terminate his employment in these circumstances.

146. In conclusion therefore we find that the respondent genuinely believed that the claimant had committed gross misconduct, that this belief was based on reasonable grounds, and that it followed a full fair and reasonable investigation. The claimant's dismissal for gross misconduct was clearly within the band of reasonable responses which were reasonably open to this respondent when faced with these facts. In these circumstances we have no hesitation in concluding that even bearing in mind the size and administrative resources of this respondent, the dismissal of the claimant was fair and reasonable in all the circumstances of the case.

147. We therefore dismiss the claimant's claim for unfair dismissal under section 98(4) of the Act.

148. Direct Discrimination s13 EqA

149. The claimant initially raised four allegations of direct discrimination because of race, namely his Latvian nationality. These allegations, and findings in each case, are as follows.

150. Allegation 1: This allegation is that the respondent appointed the claimant as Site Safety Supervisor, and then promoted him to Fuel Supervisor in 2019, which the claimant alleges was done in order to exploit the fact that his English was not his first language and to blame him for difficulties which subsequently arose. The claimant withdrew this allegation of direct discrimination at the commencement of this hearing, and it is accordingly dismissed.

151. Allegation 2: This is the respondent submitting an AIR in October 2020 (the First AIR"). The relevant background is set out in detail in findings of fact above, but in short, the respondent operates a safety and security critical environment and there are potentially catastrophic consequences in the event that the respondent's security is compromised. The respondent is required to comply with JSP 440 which sets out examples of circumstances in which staff may become susceptible to pressure or improper influence, and this gives rise to reporting obligations in that respect. Immediately before the submission of this first AIR the respondent was aware of the following matters: (i) the local management at the Thanckes Depot had made repeated comments about claimant's aggressive and antagonistic behaviour; (ii) this constituted a marked change in the claimant's behaviour which had previously been excellent; (iii) the claimant was pursuing a range of serious allegations against the respondent with no attempt to seek to agree to resolve differences, for instance by way of mediation; (iv) the claimant insisted that four managers at the depot should all be suspended; (v) the claimant made covert recordings of conversations on a security critical site; (vi) the claimant and his trade union representative acknowledged that there had already been a breakdown in the relationship between the parties; and (vii) following discussion the PSyA agreed that an AIR should be raised.

152. It is abundantly clear that these were the reasons why the respondent raised this First AIR. The claimant asserts that this was because of his Latvian nationality. The claimant does not rely upon an actual comparator, and so in effect seeks to argue that an hypothetical non-Latvian comparator in identical circumstances would not have had an AIR report raised against him. This assertion was not put to any of the respondent's witnesses, not least Mrs Jemmett who raised this First AIR. On the other hand, Mrs Jemmett's evidence was clear and cogent to the effect that the claimant's Latvian nationality had nothing to do with the raising of this First AIR

153. Allegation 3: This is the respondent submitting an AIR on 18 January 2021 (the Second AIR). We repeat our findings set out above as to the reasons why Mrs Jemmett submitted this AIR. There was the discovery that (i) the claimant was giving evidence for a disgruntled former employee and that he had provided that employee with confidential information without authorisation; (ii) that a former colleague of the claimant had gained unauthorised access to his previous employer's computer systems and had attempted to blackmail that company; (iii) the discovery in the two to three days previously that the claimant had apparently gained repeated access to his disabled email account in breach of clear instructions to the contrary; (iv) the news on 18 January 2021 that his security

clearance had been reinstated; and (v) the fact that Mrs Jemmett was instructed to raise the AIR by the relevant UK Security Vetting case officer at the MoD.

154. Again, it is abundantly clear that these were the reasons why the respondent raised this Second AIR. The claimant asserts that this was because of his Latvian nationality. The claimant does not rely upon an actual comparator, and so in effect seeks to argue that an hypothetical non-Latvian comparator in identical circumstances would not have had an AIR report raised against him. This assertion was not put to any of the respondent's witnesses, not least Mrs Jemmett who raised this Second AIR. On the other hand, Mrs Jemmett's evidence was clear and cogent to the effect that the claimant's Latvian nationality had nothing to do with the raising of this Second AIR.

155. Allegation 4: This is the respondent submitting an AIR on 1 March 2021 (the Third AIR). As noted above, it is clear to us, and we so find, that this Third AIR was caused solely by Mrs Jemmett's discovery on 26 February 2021 that the claimant had forwarded Mr Jacobs' P60 from his work account to his personal account nearly a year previously on 26 March 2020. This was of a matter of grave concern such that an emergency meeting was convened of the Audit and Risk Assurance Committee. That Committee determined that it was appropriate to report the matter as an AIR. The MoD confirmed independently to Mr Jackson that an AIR should be raised.

156. Again, it is abundantly clear that these were the reasons why the respondent raised this Third AIR. The claimant asserts that this was because of his Latvian nationality. The claimant does not rely upon an actual comparator, and so in effect seeks to argue that an hypothetical non-Latvian comparator in identical circumstances would not have had an AIR report raised against him. This assertion was not put to any of the respondent's witnesses, not least Mrs Jemmett who raised this Third AIR. On the other hand, Mrs Jemmett's evidence was clear and cogent to the effect that the claimant's Latvian nationality had nothing to do with the raising of this Third AIR.

157. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.

158. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.

159. In conclusion therefore all of the claimant's claims are hereby dismissed

160. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 81; a concise identification of the relevant law is at paragraphs 83 to 112; how that law has been applied to those findings in order to decide the issues is at paragraphs 113 to 159.

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Employment Judge N J Roper
Dated: 6 February 2023

Judgment sent to Parties on
20 February 2023 By Mr J McCormick

For the Tribunal Office